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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA ex rel.
E. BENJAMIN NELSON, Governor,

Petitioner,

v.

CENTRAL INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMMISSION; and US ECOLOGY, INC., a California Corporation,

Respondents.

Petition For Writ Of Certiorari From The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner, a member of a five state interstate compact, challenged whether the requirements for selection of a site for construction of a low-level radioactive storage facility for the compact had been met for a proposed site. The Eighth Circuit affirmed the district court decision dismissing the action because it was filed "60 days after the [compact] Commission's final decision" on selection of the site even though (1) the Commission took no vote, and, (2) pursuant to compact language, a "final" decision on the site has not yet been made. The questions presented are:

1. Whether an interstate compact commission can make a "final" decision, which decision would commence a 60 day limitation on judicial review, without taking a vote of its members when the compact, as ratified by Congress, specifically requires that "no action of the Commission shall be binding unless a majority of the total membership cast a vote in the affirmative."

2. Whether a federal court can deny a member state judicial review of a dispute arising out of an interstate compact by applying case law interpreting "finality" under the Federal Administrative Procedures Act, even though that law is inconsistent with the express terms of the compact.

PARTIES TO THIS ACTION

The parties to this proceeding are the petitioner, the Governor of the State of Nebraska, on behalf of the State of Nebraska and as parens patriae for the citizens of the State of Nebraska, and the respondents, the Central Interstate Low-Level Radioactive Waste Compact Commission and US Ecology, Inc., a California corporation.

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CENTRAL INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMMISSION; and US ECOLOGY, INC., a California Corporation,

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PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 26 F.3d 77 (1994) and is attached hereto at App.1-9. The Decision and Order of the

Federal District Court for the State of Nebraska is attached at App.10-35.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals affirming the decision of the United States District Court for the District of Nebraska was entered on June 13, 1994. A request for rehearing en banc was denied on July 25, 1994. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.*, sets out the procedures for appeal of administrative agencies. "Agency" means each authority of the Government of the United States.

Article I, § 10 of the Constitution of the United States holds in pertinent part that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . "

The Central Interstate Low-Level Radioactive Waste Compact (Neb. Rev. Stat. Vol. 2A, Appendix AA (1989)) (App.39-54) promulgated pursuant to the Low-Level Radioactive Waste Policy Act of 1980 (42 U.S.C. § 2021d(3)(A)) and the Low-Level Radioactive Waste Policy Act Amendment of 1985.

STATEMENT OF THE CASE

On December 8, 1987, the Central Interstate Low-Level Radioactive Waste Commission voted that it would not locate a low-level radioactive waste site in any location where there was not "community consent." This policy was never amended or repealed. Despite this important policy, adopted by a unanimous vote of the Commission, executive officers of the Commission are seeking to locate the low-level radioactive waste storage facility at a site in Nebraska without a determination by the Commission, by a majority vote, that community consent does, in fact, exist at that location.

The Governor of the State of Nebraska, in the name of the State of Nebraska and as parens patriae for the citizens of the State, filed suit on January 13, 1993, in the Federal District Court for the District of Nebraska against the Central Interstate Low-Level Radioactive Waste Compact Commission (Commission) and US Ecology, Inc. Jurisdiction of the federal court was sought under 28 U.S.C. § 1332(a) and 28 U.S.C. § 1331. The court granted jurisdiction under 28 U.S.C. § 1331 based on federal-question jurisdiction.

The suit sought a declaratory judgment on the question of whether community consent was a prerequisite under the terms of the Central Interstate Low-Level Radioactive Compact (Compact) and resolutions adopted thereunder before a low-level radioactive storage facility could be built in the State of Nebraska as host state for the Compact. The suit further requested, if the court determined that community consent was a prerequisite under the Compact, that an injunction be issued to stop

development of the proposed facility until the defendants demonstrated that community consent had been obtained or until it was demonstrated that all attempts had been made to obtain community consent.

On October 8, 1994, the Federal District Court granted Defendants' request for summary judgment. The court held that the plaintiff's suit was barred by the statute of limitations since it was filed more than 60 days from a final decision of the Commission. The court further held that the State's case was also barred by the doctrines of estoppel and laches.

The Governor, on behalf of the State of Nebraska, timely appealed the Federal District Court's decision to the Eighth Circuit Court of Appeals alleging that the three events cited by the district court as beginning the running of the time for appeal under the Compact were not "final decisions of the Commission" and thus could not form the beginning of the statute of limitations. The Governor, on behalf of the State, also argued that laches and equitable estoppel were not appropriate against the State, especially in the circumstances presented in the case before the court.

In a decision issued on June 13, 1994, the Eighth Circuit Court of Appeals affirmed the Federal District Court's decision that the State's action was time barred. In determining whether the Commission's decisions were final, the Eighth Circuit applied case law interpreting the Federal Administrative Procedures Act and its interpretation of a "final decision." The circuit court declined to address the issues of laches and equitable estoppel.

On June 24, 1994, the State filed a Motion for Reconsideration and Rehearing En Banc before the Eighth Circuit Court of Appeals alleging that the court incorrectly applied the Federal Administrative Procedures Act to the Compact and Commission actions. The State's motion was denied on July 25, 1994.

REASONS FOR GRANTING THE WRIT

First, the Commission cannot be allowed to take an important action in violation of the Compact, which specifically requires a majority vote of the Commission for any binding action. A formal action without a majority vote violates the express language of the Compact as adopted by the member states and ratified by Congress.

The enforcement of the majority voting requirement is particularly important where an individual or a state is required to challenge that action in federal court within 60 days of the decision. If the Commission may take important actions without a vote, neither the State of Nebraska nor any other member state of the Compact can ever know when the 60 day limitation for challenge of Commission actions begins to run. That is exactly what happened in this case.

Secondly, is the important question of what law governs an interstate compact. Should contract law govern interstate compacts, or does application of the Federal Administrative Procedures Act (5 U.S.C. §§ 701 *et seq.*) supersede basic contract law.

The member states of the Compact adopted language that, "No action of the Commission shall be binding

unless a majority of the total membership casts its vote in the affirmative."[1] This language was ratified by Congress.

The member states also adopted Compact language providing that any person or state aggrieved by "a final decision of the commission" may obtain judicial review in the United States District Court within "60 days after the Commission's final decision."[2] This language was also ratified by Congress.

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[1] Similar provisions are found in the Appalachian States Low Level Radioactive Waste Compact, (Delaware, Maryland, Pennsylvania, and West Virginia), See, 35 Pa. Cons. Stat. Ann. § 7125.1, Art. 2(A)(4) (1993); the Northeast Interstate Low-Level Radioactive Waste Management Compact (Connecticut and New Jersey), See, Conn. Gen. Stat. Ann. § 22a-161, Art.IV, § 4.1 (West 1958); the Southwestern Low-Level Waste Compact, (Arizona, California, North Dakota, and South Dakota), See, S.D. Codified Laws § 34-21B-3, Art. 3(f) (1994); the Southeast Interstate Low-Level Radioactive Waste Management Compact, (Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia), See, Ala. Code § 22-32-1, Art. IV(b) (1975); the Central Midwest Interstate Low-Level Radioactive Waste Compact, (Illinois and Kentucky), See, Ky. Rev. Stat. Ann. § 211.859, Art. III(b) (Michie 1991); Rocky Mountain Low-Level Radioactive Waste Compact, (Colorado, Nevada and New Mexico), See, Colo. Rev. Stat. Ann. § 24-60-2202, Art. 6.C. (West 1982), and the Midwest Interstate Low-Level Radioactive Waste Compact, (Indiana, Iowa, Minnesota, Missouri, Ohio and Wisconsin), See, Minn. Stat. Ann. § 116C.831, Art. III(b) (West 1986).

[2] Similar provisions are also found in the Appalachian States Low-Level Radioactive Waste Compact, See, 35 Pa. Cons. Stat. Ann. § 7125.1, Art. 2(A)(5)(e) (1993); the Northeast Interstate Low-Level Radioactive Waste Management Compact, See, Conn. Gen. Stat. Ann. § 22a-161, Art. IV, § 4.8 (West 1958); and the Midwest Interstate Low-Level Radioactive Waste Compact, See, Minn. Stat. Ann. § 116C.831, Art. III(o) (West 1986).

In December, 1987, the Commission voted unanimously that it would not locate a low-level radioactive waste facility in any location where there was not community consent. On or about December 29, 1989, US Ecology, the developer for the facility, announced it had selected a site in Nebraska as its preferred site for construction of the regional low-level radioactive waste storage facility. Subsequently, the Chairman of the Commission, independently, sent a letter to the Nebraska Legislature stating that a site in Boyd County was the preferred site for the facility. No vote was ever taken by the Commission on the preferred site or on whether to send a letter on the subject to the Nebraska Legislature. Shortly thereafter, in a document dated February 14, 1990, and sent to the Nebraska Legislature, US Ecology provided notice that the Boyd County site was its final site selected for license application. Neither the Commission nor US Ecology has ever attempted to demonstrate that community consent for construction of the proposed radioactive waste facility has been obtained.

In the current case, plaintiff requested a declaratory judgment whether community consent is a necessary prerequisite of construction of the proposed facility. The Federal District Court, as affirmed by the Eighth Circuit Court of Appeals, determined that the plaintiff was barred from bringing the lawsuit by the statute of limitations since the Compact provided that suit must be brought within 60 days of a final decision. The Federal District Court determined that any one of three events was a final decision within the meaning of the Compact. Those events were the letter written by the Chairman of the Commission to the Legislature of the State of

Nebraska; the letter written to the Legislature of the State of Nebraska by the developer of the facility, US Ecology; and a letter and memo written by the Executive Director and Counsel for the Commission and delivered to the Governor Elect of the State of Nebraska. There is no evidence that the Commission took any vote on these matters.

The Eighth Circuit affirmed the Federal District Court's determination that these events were final decisions of the Commission. The State has repeatedly argued that these cannot be final decisions of the Commission because there is no record that the Commission voted on any of the issues or made **any** decision on these issues. The court's analysis would allow the Commission to make innumerable "final decisions" in secret or with notice to a limited number of cooperating individuals that would bind all member states and the citizens of all member states whether or not the "decision" becomes public.

Democracy has never condoned tacit, back room agreements. Democracy requires the involvement of the people and a necessary part of the people's involvement is their access to information about what is happening. Only a final, formal decision of the court may be appealed. Only a final decision of an administrative agency may be appealed. The final decisions involved in the cases cited by the courts in their decisions were decisions that were made readily accessible to the public in general. Conversely, the courts in this case have determined that all parties to a contract are to be bound by informal letters to the representative of only one of the parties to the contract.

The Federal District Court and the Eighth Circuit Court of Appeals have determined in their decisions in this case that the Federal Administrative Procedures Act (5 U.S.C. §§ 701 ***et seq.***) and its judicial interpretations are applicable to an interstate compact even when the compact specifically addresses the terms in question and when application of the APA creates a conflict with the Compact language. The State of Nebraska concedes, because of the quasi-federal nature of an interstate compact, that the Federal APA might apply to a compact when it concerns an issue not addressed by the compact language. But the APA should not control when its application would be in conflict with the terms of the compact itself.

A compact is defined by the 1985 Act as an agreement "entered into by two or more states pursuant to [this Act]." 42 U.S.C. § 2021b(4). Before a regional compact attempts to restrict the use of a regional disposal facility to waste generated within the region, Congress must consent to the compact. 42 U.S.C. § 2021d. Once a compact is ratified by Congress, it becomes an independent entity of binding force which operates with the same effect as a treaty between sovereign nations. ***Rhode Island v. Massachusetts***, 37 U.S. (12 Pet.) 657, 725 (1838). "Congressional consent transforms an interstate compact . . . into a law of the United States. . . . One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." ***Texas v. New Mexico***, 462 U.S. 554, 564 (1983). Also, unilateral action on the part of one compact member is not binding on the compact. ***Kansas City Area***

Transp. Auth. v. State of Mo., 640 F.2d 173, 174 (8th Cir. 1981) ("one party to an interstate compact may not enact legislation which would impose burdens upon the compact absent the concurrence of other signatories").

It has generally been held that where the language of a contract is clear, there is no room for construction and that rules of construction may be resorted to only where the contract is ambiguous. 294 C.J.S. *Contracts* § 294b(1) (1963).

A contract between states, when approved by Congress, becomes a law of the United States. In interpreting the language of the Compact, the courts should look to the Compact as a whole, and the words of the Compact should be accorded their normal meanings unless there is evidence that a contrary meaning is intended.

The Eighth Circuit's determination that actions by one representative of a compact, or by employees of a compact can bind the compact and all member states of the compact despite the precise terms of the contract, which specifically requires a majority vote, creates a serious precedent. If this decision is allowed to stand, it creates a standard by which other interstate compacts would be required to function and by which their actions would be judged. The question of the extent to which one representative of a member state or one employee of the compact can bind the compact is serious and should be resolved for this case and be determined in such a way that this compact and all other compacts will be aware of the effect of federal legislation on their compact conditions and so they can act accordingly.

The Federal District Court and the Eighth Circuit Court of Appeals have decided that the Federal Administrative Procedures Act supersedes the language of the contract between the member states. Because of the numerous interstate compacts currently in force and those contemplated or under consideration, it is important to know whether, and to what extent, the Federal Administrative Procedures Act should be used in interpreting the terms of those compacts.

The State of Nebraska also alleges that the lower courts have wrongly applied the Federal Administrative Procedures Act to this case because the decision in question is not final. The words of the Compact define what the final decision is and the actions set out by the lower courts do not come within that definition.

Article V of the Compact sets out the criteria for the development and operation of regional facilities and declares what the final decision is with regard to the Compact. In addressing the selection of a site for the facility, Article V(f) (App.49) states:

> The preliminary selection of selections made by the Commission pursuant to this Article *shall become final and receive the Commission's approval as a regional facility upon the issuance of a license by the licensing authority.* If a proposed regional facility fails to become licensed, the Commission shall make another selection pursuant to the procedures identified in this Article.

(Emphasis added.)

The Eighth Circuit Court of Appeals interpreted "final decision" based on judicial interpretations of the

Federal Administrative Procedures Act (5 U.S.C. §§ 701 *et seq.*) rather than the words of the compact, which is the contract between the states. The compact itself has a procedure for appeal and contains definitions for "binding action" and "final decision" which should prevail.

The Compact itself states that "no action of the Commission shall be binding unless a majority of the total membership cast its vote in the affirmative." None of the actions cited by the Federal District Court were undertaken by the Commission as a whole and clearly none of the actions were ever voted on by the Commission. The Eighth Circuit applied the rationale that there was no protestation by the Commission members after such time as they would have been aware of these actions and therefore the actions would be binding on them (App.25-26). However, the Compact requires that there be a vote taken of the Commission members and that no action is binding **unless** a majority of the total membership **cast its vote** in the affirmative. A procedure was adopted by the Compact members for creating a binding vote. The members of the Compact had a right to expect that conformance with that procedure would be the only way to create a binding action. The courts have expanded the words of the Compact and have adopted a new method of creating binding action that is beyond the terms of the contract between the parties.

Federal District Judge Kopf relied on ***Federal Trade Commission v. Standard Oil Co. of Cal.***, 449 U.S. 232 (1980), in his decision, for the definition of a "final order." That definition, based on the Federal Administrative Procedures Act, stated:

> Generally speaking, a decision, such as the one at issue here, is final when any one of three factors is present: (1) the ruling is definitive, (2) the ruling has legal force or impacts the party seeking relief in a practical way, or (3) review of the ruling would serve efficiency or enforcement of the underlying law.

However, the Supreme Court held in that case that the issuance of the Complaint by the FTC did not constitute "final agency action" subject to judicial review. The Court stated:

> In sum, the Commission's issuance of a complaint averring reason to believe that Socal was violating the Act is not a definitive ruling of regulation. It has no legal force or practical effect upon Socal's daily business other than the disruptions that accompany any major litigation. And immediate judicial review would serve neither efficiency nor enforcement of the Act. These pragmatic considerations counsel against the conclusion that the issuance of the complaint was final agency action.

Similarly, in this case, the Commission's "decision" has no legal force since clearly by the words of the Compact, it is not binding on the Commission. Article IV(b) (App.43) of the Compact provides that no action of the Commission is binding unless a majority of the total membership casts its vote in the affirmative. The wording of the Compact does not allow for a binding decision through tacit approval. To hold otherwise is to ignore the precise language of the Compact adopted by the member states. The State of Nebraska argues that the actions of the lower courts in applying the Federal APA to the Compact have misinterpreted those cases since the very

cases cited by the court would allow only final or legally binding decisions to be appealed under the APA.

Further, the Compact itself sets out what is a final decision for purposes of the licensing of the proposed facility. The Compact refers to a final decision in only one section, namely Article V(f), wherein it states: "The preliminary selection or selections made by the commission pursuant to this Article shall become **final** and receive the commission's approval as a regional facility upon the issuance of a license by the licensing authority. . . . " (emphasis added).

When an interstate compact, a contract between states, sets out what is a final decision and when a decision is binding, these terms of the contract should not be interpreted by the courts in a manner that conflicts with the terms of the contract. The wording of the Compact is clear. There should be no need to resort to other sources for interpreting the clear terms of the contract.

The Compact, like any other contract, should be interpreted based on the words of the contract itself. States entering into compacts should be assured that the contract terms, as adopted by the states, will prevail. The Compact at issue here sets out clearly when a decision is binding and what the final decision of the Commission is. There is no need for the court to resort to outside sources for interpretation of its terms. Since many of the other interstate compacts for development of radioactive waste facilities contain the same language, it is important that the lower courts' interpretation of the compact language not be allowed to stand as precedent.

Finally, although the Eighth Circuit did not address the issue, petitioner contends that the doctrines of laches and equitable estoppel do not apply against the State of Nebraska in the type of action brought in this case. There has been no detrimental reliance by the other party states which would warrant the use of these defenses against the State.

CONCLUSION

The petitioner respectfully requests that the Court overturn the lower courts' determination and rule: (1) that an interstate compact cannot make fundamental decisions without a vote when the Compact specifically requires a vote; (2) that petitioner's action is not barred by the statute of limitations because in the absence of a vote there has been no final decision of the Commission which would cause the statute of limitations to begin to run; and (3) that the words of the Compact be determinative of what are final and binding decisions of the Commission.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-3724

State of Nebraska, ex rel. E. Benjamin Nelson, Governor, Appellant, v. Central Interstate Low-Level Radioactive Waste Commission; U.S. Ecology, Inc., a California Corporation, Appellees.	* Appeal from the United States District Court for the District of Nebraska.

Submitted: April 12, 1994

Filed: June 13, 1994

Before McMILLIAN and WOLLMAN, Circuit Judges, and NANGLE,* Senior District Judge.

WOLLMAN, Circuit Judge.

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* The HONORABLE JOHN F. NANGLE, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

The State of Nebraska ("the State") appeals from the district court's[1] order granting summary judgment in favor of the Central Interstate Low-Level Radioactive Waste Commission ("the Commission") and U.S. Ecology, Inc., a California corporation. We affirm.

I.

The Low-Level Radioactive Waste Policy Act, enacted in 1980, permits states to "enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." 42 U.S.C. § 2021d(a)(2). Pursuant to the Act, Arkansas, Kansas, Louisiana, Nebraska, and Oklahoma entered into the Central Interstate Low-Level Radioactive Waste Compact[2] ("the Compact"), and Congress approved the Compact, 42 U.S.C. § 2021d note.[3] The purpose of the Compact is to protect the health, safety, and welfare of the citizens and the environment, to provide a framework for effective and efficient management of low-level radioactive waste, and to distribute among the member states the costs of disposing of such waste. The Commission, established by the Compact, is the entity responsible for carrying out the Compact's purpose. Specifically, the Compact requires the Commission

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[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

[2] The Compact appears in Volume 2A of the Revised Statutes of Nebraska at Appendix BB.

[3] For the background of the Compact, see *Concerned Citizens of Nebraska v. United States Nuclear Regulatory Commission*, 970 F.2d 421 (8th Cir. 1992).

to develop and operate a disposal facility for low-level radioactive waste generated within the member states.

In late 1987, the then governor of Nebraska, Kay Orr,[4] believed that Nebraska would probably be chosen as the host state for the disposal facility. She therefore proposed conditions that would have to be met before a facility could be located in Nebraska, and the Commission adopted the conditions. One of the conditions provided that a disposal facility would not be located in a community without that community's consent. In December 1987, the Commission selected Nebraska as the host state.

Soon thereafter, the Commission contracted with U.S. Ecology to develop and operate the facility. U.S. Ecology then began the process of selecting a site in Nebraska for the facility, conducting preliminary feasibility studies in those areas for which it received a formal request from both the community and respective county. Based upon its preliminary studies, U.S. Ecology selected three potential sites for detailed site-characterization and suitability studies. For each of the three sites, the major community located within the zone of potential environmental impact had in place a resolution supporting a nearby disposal facility.

On December 29, 1989, U.S. Ecology sent a letter to the chairperson of the Butte Village Board of Trustees

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[4] At the time that the State filed this action, E. Benjamin Nelson was the governor of Nebraska. He was elected in November 1990 and began serving a four-year term in January 1991.

informing him that U.S. Ecology had selected a site in Boyd County near the Village of Butte as its preferred site.

On February 6, 1990, Norman W. Thorson, who was than the chairperson of the Commission, sent a letter to the members of the Nebraska legislature stating, "So that there will be no possible misunderstanding of the Commission's or the Developer's intentions, the Commission has directed US Ecology to file a Notice of Final Selection with the Clerk of the Legislature, which notice will clearly identify the Butte site as the only site under consideration." Thorson sent a copy of the letter to Governor Orr, to the other Commissioners, and to the Compact's executive director. Approximately a week later, U.S. Ecology filed with the Nebraska legislature a document entitled "Notice of Final Selection." The document stated, "At the direction of the . . . Commission (per its letter of February 6, 1990), US Ecology hereby formally provides notice to the Nebraska unicameral that the selection of the Butte site is the final site selected for license application. . . . I trust that this Notice of Final Selection clearly sets forth US Ecology's intent and resolves any remaining questions concerning the finality of the Butte site selection decision."

In July 1990, U.S. Ecology submitted to the Nebraska Department of Environmental Control (now known as the Nebraska Department of Environmental Quality) an application for a license to construct and operate a regional disposal facility at the Boyd County site.

Nebraska law does not require or authorize a vote of any kind as a measure of community consent, and Governor Orr, who originated the concept, anticipated that community consent would be determined through the actions of locally elected officials. On December 8, 1992, however, the Boyd County Local Monitoring Committee conducted an informal poll to determine whether the community supported the construction of a disposal facility at the selected site. A majority of those responding to the poll opposed construction of the facility in Boyd County. On January 12, 1993, the Board of Trustees of the Village of Butte passed a resolution reaffirming its support for a disposal facility in Boyd County. The next day, the State filed this action, alleging that the Commission and U.S. Ecology had not complied with the community consent requirement before making the final site selection. Finding that the action was barred by the applicable limitations period as well as by the equitable doctrines of estoppel and laches, the district court granted the defendants' motions for summary judgment. *State ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n*, 834 F. Supp. 1205 (D. Neb. 1993).

II.

We review de novo a grant of summary judgment. *Walker v. National City Bank of Minneapolis*, 18 F.3d 630, 631 (8th Cir. 1994). We must determine whether the record, when examined in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c);

Bridgewater v. Caples, No. 93-3151, slip op. at 3 (8th Cir. May 11, 1994).

Article IV, paragraph *1* of the Compact states that "a party state aggrieved by a final decision of the commission may obtain judicial review of such decisions in the United States District Court in the district wherein the commission maintains its headquarters by filing in such court a petition for review within sixty days after the commission's final decision."

Although the State did not file this action until January 13, 1993, almost three years after the legislature had been formally notified that the disposal facility would be located in Boyd County, it argues that the sixty-day limitation period does not bar the action, contending that there is no evidence that the Commission made a final decision regarding site selection.[5]

The State argues that Chairperson Thorson's letter and U.S. Ecology's notice of site selection did not constitute binding decisions of the Commission and therefore did not trigger the sixty-day limitation period. Article IV, paragraph b of the Compact provides that "no action of the commission shall be binding unless a majority of the total membership casts its vote in the affirmative." Whether the letter or notice can constitute a binding Commission decision, however, is not the issue. Rather, the question is whether the record, which includes the letter and notice, shows that there is no genuine issue of

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[5] The State conceded during oral argument that if we were to agree that the Commission has not made a final decision, the case would not be ripe for decision.

fact that the Commission had made a final decision. Even if we assume that the letter and notice cannot constitute a binding Commission decision, the contents of the two documents, which are undisputed, indicate that the Commission, not the authors of the documents, made the final site selection. Chairperson Thorson sent a copy of his February 6 letter to all of the other commissioners, and there is no evidence that any of them objected to its contents. In fact, the State submitted no evidence that a majority of the Commission did not support the selection of the Boyd County site. A party opposing a summary judgment motion cannot simply rely on allegations, but must come forward with specific evidence establishing that there is a genuine issue fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

Thorson's letter and U.S. Ecology's notice indicate that the Commission's selection of the Boyd County site was its final decision. "The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In deciding whether an agency's action is final, the "core question is whether the agency has completed the decisionmaking process." *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2773 (1992); *see also Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 808 F. Supp. 1474, 1480-81 (D. Nev. 1992) (finding that because the policy and effect of an agency's temporary resolution is clear, the resolution is a final action for purposes of a compact's sixty-day limitation period). The language of Thorson's letter and U.S. Ecology's notice of final selection leave no doubt that the Commission's site selection process had been completed.

Both documents indicate that the Butte site in Boyd County was the Commission's final selection. After the Commission directed U.S. Ecology to inform the Nebraska legislature of the final site selection, the Commission had nothing left to do. Pursuant to Article V, paragraph f of the Compact, the Boyd County site would become the regional disposal facility upon issuance of a license by the State. Accordingly, we conclude that there is no genuine issue of fact as to whether the Commission made a final decision.

The State argues that even if its action against the Commission is barred by the Compact's sixty-day limitation period, its action against U.S. Ecology is not time barred because the Compact's limitation period applies only to actions against the Commission.[6] The language of the Compact, however, does not support the State's argument. Article IV, paragraph *1* provides that the sixty-day limitation period applies to all actions by "[a]ny person or party state aggrieved by a final decision of the commission." Thus, the application of the sixty-day limitation period is determined by the nature of the plaintiff's claim rather than by the identity of the defendant. The essence of the State's action against U.S. Ecology is a challenge to the Commission's site selection and thus is barred by the Compact's limitation period. *See American Hotel Management Assocs. v. Jones,* 768 F.2d 562, 568 (4th Cir. 1985) (stating that courts applying a statute of limitations look at the nature of the plaintiff's claim rather than the form

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[6] Despite its contention that the Compact's limitation period does not apply to its action against U.S. Ecology, the State does not suggest what limitation period should apply.

of the action or relief demanded); *Dolmetta v. Uintah Nat'l Corp.*, 712 F.2d 15, 19 (2d Cir. 1983) (same). The State's action was field on January 13, 1993, but the State was formally notified of the Commission's decision in February 1990, almost three years earlier. Accordingly, the district court properly held that the State's action was barred by the Compact's sixty-day limitation period.

Having decided that the district court properly held that the State's action was time barred, we need not consider the district court's alternative holding that the State's action was barred by the equitable doctrines of estoppel and laches.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, ex rel. E. BENJAMIN NELSON, Governor, Plaintiff, vs. CENTRAL INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMMISSION, and US ECOLOGY, INC., a California Corporation, Defendants.	4:CV93-3042 **JUDGMENT** (Filed Oct. 8, 1993)

Pursuant to the court's Memorandum and Order filed in this matter on this date,

IT IS ORDERED that summary judgment is entered in favor of Defendants, and against Plaintiff, providing that Plaintiff shall take nothing as this action is barred by the applicable limitations period, and by the equitable determines of estoppel and laches.

DATED this 8th day of October, 1993.

BY THE COURT:

/s/ Richard G. Kopf
RICHARD G. KOPF
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, ex rel. E. BENJAMIN NELSON, Governor, Plaintiff, vs. CENTRAL INTERSTATE LOW-LEVEL RADIO-ACTIVE WASTE COMMISSION, and US ECOLOGY, INC., a California corporation, Defendants.	4:CV93-3042 **MEMORANDUM AND ORDER** (Filed Oct. 8, 1993)

Pending before me are Defendants' motions seeking summary judgment (Filings 29 and 30). After considering the briefs and evidence of the parties and hearing their oral arguments, I shall grant the motions for summary judgment, finding that (1) this action is time barred by the applicable limitations period, and (2) even if this action were not time barred by the applicable limitations period, it would be barred by the equitable doctrines of estoppel and laches.

I.

A.

This is another in a series of lawsuits regarding efforts to stop development of a regional low-level radioactive waste disposal facility. **See, e.g., Concerned Citizens of Neb. v. United States Nuclear Regulatory**

Comm'n, 970 F.2d 421 (8th Cir. 1992) (affirming in relevant part the decision of the United States District Court for the District of Nebraska dismissing a complaint by an unincorporated, nonprofit citizens' organization and four of its members seeking to stop development of a regional low-level radioactive waste disposal facility). Speaking for the United States Court of Appeals for the Eighth Circuit in Concerned Citizens of Neb., Judge Beam aptly summarized the background of this case as well:

> In 1980, Congress enacted the Low-Level Radioactive Waste Policy Act (LLRW Act), Pub.L. No. 96-573, 94 Stat. 3347 (1980) (amended 1986), to promote the development of regional low-level radioactive waste disposal facilities. Pursuant to the LLRW Act, Nebraska and four other states entered the Central Interstate Low-Level Radioactive Waste Compact (Compact) and requested congressional approval of the Compact. In 1986, Congress approved the Compact under the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub.L. No. 99-240, tit. II, sec. 222, 99 Stat. 1859, 1863 (1986). At the same time, Congress amended the LLRW Act by enacting the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRW Amendments), Pub.L. No. 99-240, tit. I, 99 Stat. 1842 (1986) (codified at 42 U.S.C. §§ 2021b-2021j (1988)).
>
> The Compact established the Central Interstate Low-Level Radioactive Waste Compact Commission (Compact Commission) as its governing body. The Compact Commission designated Nebraska as the host state for the disposal facility and selected Boyd County as the facility's site. The Compact Commission contracted

> with US Ecology, Inc., a private corporation, to develop and operate the facility.

Id. at 422-23 (footnote omitted).

The Compact of which Nebraska is a member contains two provisions especially material to this opinion.[1] Article IV, paragraph (1), of the Compact provides that:

> Any person or party state aggrieved by a final decision of the commission may obtain judicial review of such decisions in the United States District Court in the district wherein the commission maintains its headquarters by filing in such court a petition for review within sixty days after the commission's final decision. Proceedings thereafter shall be in accordance with the rules of procedure applicable in such court.

The Compact also provides for an extensive site selection process. Art. V. §§ (c), (d), (e) & (f). A site selection by the Commission "shall become final and receive the commission's approval as a regional facility upon the issuance of a license by the licensing authority." Art. V § (f).

The site selected by the Commission is the Boyd County site (sometimes called the Butte site). **See Concerned Citizens of Nebraska,** 970 F.2d at 423. The Boyd County facility is currently awaiting a license from the Nebraska Department of Environmental Quality (previously known as the Department of Environmental Control). **Id.**

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[1] The Compact is recorded in volume 2A of the Revised Statutes of the State of Nebraska (Reissue 1989) App. (BB).

B.

1.

This case was filed January 13, 1993. (Filing 1 Compl.) The amended complaint, filed January 26, 1993, (Filing 3), indicates this case seeks declaratory and injunctive relief and requests a finding that the Central Interstate Low-Level Radioactive Waste Commission (Commission) and the developer, US Ecology, Inc. (US Ecology) have failed to obtain "community consent," thereby violating a resolution passed and adopted by the Commission, and violating the Low-Level Radioactive Waste Disposal Act adopted by the State of Nebraska to implement the Compact.

The Low-Level Radioactive Waste Disposal Act, Neb. Rev. Stat. § 81-1578, **et seq.** (1992 Cum. Supp.), stated it was the intent of the Nebraska legislature that to the extent possible "the developer shall make every effort to locate the facility where community support is evident." **Id.** at Neb. Rev. Stat. § 81-1579(3). It has long been the law that one member state in a compact cannot unilaterally nullify the provisions of a compact or give final meaning to the terms of a compact. **West Virginia ex rel. Dyer v. Sims,** 341 U.S. 22, 28 (1951).

I do not understand Plaintiff to contend that the Low-Level Radioactive Waste Disposal Act added a condition to the Compact or otherwise defined a term that was not agreed upon by the Compact Commission when the Commission passed the alleged resolution agreeing to community consent. Therefore, Nebraska law has no particular independent significance in this lawsuit.

2.

There are no material facts in dispute. I further find that the following are uncontroverted facts for purposes of the motions for summary judgment in this case:

1. Arkansas, Kansas, Louisiana, Nebraska and Oklahoma are members of the Compact. (Filing 3 Am. Compl. ¶ 5.)

2. The Compact was formed under authority of federal statute, and Congress has consented to the Compact. (Filing 3 Am. Compl. ¶ 5.)

3. US Ecology is the developer of the low-level radioactive waste disposal facility contemplated by the Compact. (Filing 3 Am. Compl. ¶ 6.)

4. Nebraska is the host state for the regional disposal facility contemplated by the Compact. (Filing 3 Am. compl. ¶ 9.)

5. In late 1987, Nebraska's then governor, Kay A. Orr, proposed conditions for the proposed disposal facility for adoption by the Commission. Such conditions, including one relating to "community consent," were adopted by the Commission, subject to certain qualifications. (Ex. 2 attach. B; Ex. 3 attach. B.)

6. In 1988, the Nebraska legislature enacted the following explanation or definition of the community-consent concept:

> It is the intent of the legislature that potential host communities be actively and voluntarily involved in the siting process. To the extent possible, consistent with the highest level of

> protection for the health and safety of the citizens of the state and protection of the environment, the developer shall make every effort to locate the facility where community support is evident.

Neb. Rev. Stat. § 81-1579(3) (Cum. Supp. 1992).

7. The Nebraska legislature has repeatedly and consistently refused to enact any law requiring or authorizing a vote of any kind as a measure of the community-consent concept. (Ex. 9.)

8. Governor Orr explicitly rejected the idea that community consent should be determined by some form of local vote. (Ex. 3 ¶ 18 & attachs.)

9. There is no legal authority under Nebraska law for a governor to order, implement, or agree to any form of legally binding vote of the kind allegedly conducted by the Boyd County Local Monitoring Committee alleged in paragraphs 22 and 23 of the amended complaint. (Ex. 7.)

10. Throughout 1988 and 1989, US Ecology made extensive efforts to solicit community support for the proposed facility in a variety of communities in Nebraska. (Exs. 4, 5, 15 & 16.)

11. The community of Butte, Nebraska, in Boyd county, Nebraska, invited US Ecology to investigate the geology in the surrounding area to determine if the disposal facility could be located there. The Village Board of Butte, Nebraska, has consistently expressed support for the proposed facility, with the most recent official expression of support by the community of Butte, Nebraska, occurring at about the time this lawsuit was filed by Nebraska. (Ex. 1 & attachs.)

12. The site near Butte, Nebraska, was selected as the final site for construction of the proposed regional disposal facility in late 1989, and Nebraska was officially notified of that site selection by both the Commission and US Ecology in February, 1990. (Ex. 2 & attachs.; Ex. 3 & attachs.; Ex. 10; Ex. 15.)

13. US Ecology submitted a license application for the Butte, Nebraska, site on July 27, 1990. (Filing 3 Am. Compl. ¶ 21.)

14. Both before and after submission of the license application by US Ecology, Governor Orr made and authorized various public statements indicating that the community-consent factor had been specifically met as to the Butte, Nebraska, site. (Ex. 2 ¶ 16 & attach. C; Ex. 3 ¶ 18 & attachs.)

15. Between March, 1990, and the present date, the Commission has spent or authorized the expenditure of more than 33 million dollars in furtherance of the proposed disposal facility and of that amount, more than 8 million dollars has been paid to the State of Nebraska, mostly for license application review purposes. (Ex. 1 ¶¶ 3 & 4.)

16. On about December 7, 1990, then governor-elect Nelson was notified in an extensive legal memorandum signed by the executive director and general counsel of the Commission and by the Commission's outside legal counsel that: "the Compact Commission has concluded and firmly believes that all legal requirements relative to community consent have been met or exceeded. The form of consent made relevant to the site selection process is

one fixed at a point in time which has now passed." (Ex. 15, at 1.)[2]

The foregoing uncontroverted facts are derived from Defendants' briefs, and are essentially accepted by Plaintiff. Plaintiff's brief states:

> The Plaintiff accepts the Defendants' Statement of Facts with the following exceptions:
>
> 1. (Paragraph 6) In 1988, the Nebraska Legislature enacted the quoted paragraph as a part of Neb. Rev. Stat. § 81-1579(3) (Cum. Supp. 1992). However, the quoted language neither purports to be nor is it an explanation or definition of "community consent."
>
> 2. (Paragraph 9) Governor Nelson did not order, implement, or agree to a legally binding vote in Boyd County concerning Community Consent as stated by Defendants. An unofficial poll was held in a method approximating election laws as much as possible based on advice given by Secretary of State Alen J. Beermann to Steven J. Moeller of the Governor's Policy Research Office and Loran Sieh of the Boyd County Local Monitoring Committee (Ex. SJ 1, Moeller Affidavit). Governor Nelson never instructed the Boyd County Local Monitoring Committee or anyone else to conduct a poll on the issue of community consent although he did discuss methods of determining community consent with members of the Local Monitoring Committee.

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[2] The actual memorandum may have been delivered to then governor-elect Nelson on December 10, 1990, following a meeting on December 7. (Ex. 15 Letter of 12/10/90.)

> 3. (Paragraph 10) During 1988, US Ecology presented numerous programs to community groups and wrote to numerous governmental subdivisions seeking expressions of interest from counties, cities, towns, and/or villages to determine if an area was environmentally suitable for a facility. Oral presentations and letters to governmental subdivisions clearly stated that "Acceptance of a formal expression of interest does not constitute a commitment to accept the facility, only to becoming involved in preliminary studies" (Ex. SJ 2, Letter of Rich Paton; Ex. SJ 3, Sieh Affidavit).
>
> 4. (Paragraph 12) The Defendants, Compact Commission and US Ecology, informed the State of Nebraska in February, 1992, [*sic*] that a site near Butte in Boyd County, Nebraska, was the preferred site for construction of a low-level radioactive storage facility. The Defendants did no indicate how or when they would measure community consent for the proposed site. Plaintiff is unaware and there appears to be no evidence of when, before or during the siting process, US Ecology selected the Boyd County site.

(Pl.'s Br. at 1-2.)

Thus, except as qualified by Plaintiff, Plaintiff agreed to the statement of uncontroverted facts set forth by Defendants which I have in substance recounted. The qualifications of Plaintiff stated in the aforementioned paragraphs 1-3 of its brief are not material to my decision. The qualification set forth in paragraph 4 is not supported by any citation to evidence, and therefore

should be disregarded under Federal Rule of Civil Procedure 56(e) and Nebraska Local Rule of Practice 56.1(b). Even had I considered the qualification, however, no *material* fact would be in dispute.

II.

A.

Jurisdiction in this case is asserted under 28 U.S.C. § 1332(a) and 28 U.S.C. § 1331. This court does not have "diversity" jurisdiction under 28 U.S.C. § 1332(a) for the reason that a state is not a "citizen" for the purposes of the diversity statute. **Moor v. County of Alameda,** 411 U.S. 693, 717 (1973).

This court does, however, have federal-question jurisdiction under 28 U.S.C. § 1331. Although the Supreme Court has not squarely held that construction of an intestate compact presents a federal question under § 1331, the Court has used language that probably compels such a result.

In **Cuyler v. Adams,** 449 U.S. 433 (1981), the Court held that the Interstate Agreement on Detainers is a congressionally sanctioned interstate compact, the interpretation of which presents a question of federal law. **Id.** at 438-42. Article I, Section 10, Clause 3 of the Constitution, the Compact Clause, provides that: "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another state. . . . " The Supreme Court stated that because "congressional consent transforms an interstate compact within this Clause

into a law of the United States, we have held that construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question." **Id.** at 438 (citations omitted). Inasmuch as I believe that a construction of the provisions of Article IV and Article V of the Central Interstate Low-Level Radioactive Waste Compact is inextricably interwoven with any resolution of Plaintiff's claims, I conclude that federal-question jurisdiction has been established.

Defendants have argued that the Amended Complaint, as well as the documents submitted in support of and in opposition to the motions for summary judgment, fail to establish any of the three elements of constitutionally required standing under Article III of the Constitution: (1) injury in fact; (2) causation; or (3) redressability. **Lujan v. Defenders of Wildlife,** 112 S. Ct. 2130, 2136 (1992). However, I believe this is one of the unusual cases" where **parens patriae** standing exists. **See Alfred L. Snapp & Son, Inc. v. Puerto Rico,** 458 U.S. 592 (1982).

When the Amended Complaint is viewed in its entirety and given a liberal construction, it is apparent that the State of Nebraska is alleging that the residents of Boyd County, Nebraska, and the State of Nebraska, as a member of the Compact, will be forced to accept low-level radioactive waste to the detriment of the health and welfare of residents of Boyd County, Nebraska, and the sovereignty of the State of Nebraska, and that such a threat is real and now present. Accordingly, although **parens patriae** standing is not demonstrated with the clarity I would prefer, I believe the showing which has been made is sufficient, if only minimally so.

B.

I turn now to the substantive arguments raised by Defendants which I believe have merit and independently warrant summary judgment.[3] First, I conclude that this action is time barred under the sixty-day limitation period specified in the Compact. Second, I conclude that the equitable doctrines of estoppel and laches bar the relief sought by Plaintiff.

1.

Article IV(1) of the Compact contains a provision that a "party state aggrieved by a final decision of the commission may obtain judicial review of such decisions in the United States District Court in the district wherein the commission maintains its headquarters by filing in such court a petition for review **within sixty days after the commission's final decision.**" (emphasis added.) Such a provision is not unusual. For example, the Tahoe Regional Planning Compact, approved by Congress in 1969, contains a similar sixty-day provision. Federal courts have enforced such sixty-day limitation periods. **See, e.g., Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency,** 808 F. Supp. 1474, 1482 (D. Nev. 1992) (property owners' taking claims were time barred by the sixty-day statute of limitations set forth in the Tahoe Regional Planning Compact).

The State of Nebraska does not contend that the sixty-day limitation period is unconstitutional. I therefore

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[3] I do not decide the question of the meaning of "community consent."

assume for purposes of the motions for summary judgment that the sixty-day period is constitutional, and proceed to determine whether or not this action is time barred.[4]

On February 6, 1990, Norman W. Thorson, then chairman of the Commission, wrote every member of the Nebraska legislature about the selection of the Butte site.

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[4] Whether a limitation period is reasonable, and therefore constitutionally viable, depends on the facts of the particular case. **See, e.g., A. Soloff & Son, Inc. v. Asher,** 594 F. Supp. 724, 725 (S.D.N.Y. 1984) (holding that sixty-day period set forth in Multi-Employer Pension Plan Amendments Act was not unreasonable and did not deny employer due process). Given the need to meet congressionally mandated "milestones" regarding the disposal of low-level radioactive waste, the assertion of a fairly short limitation period against a Compact member state certainly appears to be reasonable. In December, 1985, Congress passed the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPAA-1985"), Pub. L. No. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. § 2021b note). Under LLRWPAA-1985, the states were given until January 1, 1993, to find new options for disposal. Interim milestones were set, and penalties for failure to meet those milestones were made part of LLRWPAA-1985. 42 U.S.C. § 2021e(d)(1). Effective January 1, 1986, Congress gave its consent to six regional compacts, including the Central Interstate Low-Level Radioactive Waste Compact. Omnibus Low-Level Radioactive Waste Interstate State Compact Consent Act, Pub. L. No. 99-240, tit. II in part., 99 Stat. 1864 to 99 Stat. 1871 (codified at 42 U.S.C. § 2021d note). Congressional consent was granted subject to the provisions of LLRWPAA-1985 for only as long as the provisions of the Act were followed. Congress further reserved the right to alter, amend or repeal its consent after the expiration of ten years. Thus, there is a particularly pressing need for the prompt resolution of disputes between a member state and a compact commission.

His letter stated: "So that there will be no possible misunderstanding of the Commission's or the Developer's intentions, the Commission has directed US Ecology to file a Notice of Final Selection with the clerk of the legislature, which notice will clearly identify the Butte site as the only site under consideration." (Ex. 2 ¶ 17 & attach. D at 2.) A copy of that correspondence was mailed to Governor Orr, the Compact commissioners and the Compact's executive director. (**Id.**)

In a document entitled "Notice of Final Selection," dated February 14, 1990, US Ecology notified the clerk of the Nebraska legislature that:

> [a]t the direction of the Central Interstate Low-Level Radioactive Waste Compact Commission (per its letter of February 6, 1990), US Ecology hereby formally provides notice to the Nebraska Unicameral that the selection of the Butte site is the final site selected for license application. The Butte site is the only site for which a license document will the prepared. . . . *I trust that this notice of Final Selection clearly sets forth US Ecology's intent and resolves any remaining questions concerning the finality of the Butte site selection decision.*

(Ex. 10 (emphasis added).)

Furthermore, on about December 7, 1990, the Commission provided Governor-elect E. Benjamin Nelson with a comprehensive memorandum on the community-consent issue. (Ex. 15.) In an extremely detailed, specific and blunt discussion of the legal requirements of "community consent," the Commission, through its general

counsel, executive director and outside legal counsel, specifically notified the governor-elect that:

> The Compact Commission has concluded and firmly believes that all legal requirements relative to community consent have been met or exceeded. The form of consent made relevant to the site selection process is one fixed at a point in time which has now passed. The standard set has been respected and met. Any new imposition of further requirements would be unfair and legally dangerous.

(Ex. 15, at 1.)

The Commission concluded by stating, "the position of the Compact, therefore, in view of all of the foregoing legal and factual circumstances, is that the requirement by the State of Nebraska that community support be sought by the developer has been met." (Ex. 15, at 15.)

I must determine whether there was a "final decision" by the Commission.[5] The State has not controverted

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[5] I do not understand the State to argue that the site selection is not final because no license has been issued by the State of Nebraska. Obviously, the State has not taken such a position because to do so would be to admit that its case is not ripe for decision. Sections (c), (d), (e) and (f) of Article V of the Compact provide for an elaborate site-selection process. Once a site has been selected by the Compact Commission, the selection made by the Commission becomes the "regional facility *upon the issuance of a license by the licensing authority.*" Art. V § (f). In this case, the State of Nebraska, through the Nebraska Department of Environmental Quality (formerly known as the Nebraska Department of Environmental Control), is the licensing authority. The State of Nebraska controls when the Butte site becomes "final," not the Compact Commission. Indeed, in **Concerned**

the specific sworn statement of Norman W. Thorson that "in my capacity as chairman of the Commission, I wrote to each member of Nebraska's legislature indicating that the selection of the Boyd County site was final. . . . " (Ex. 2 ¶ 17, at 6.) Thorson, who is a licensed attorney and the Judge Harry A. Spencer Professor of Law at the University of Nebraska College of Law, served the Commission as its chairman and as Nebraska's representative to the Commission. Thus, there is simply no basis in fact for concluding that the Commission had not selected the Butte site as its final site.

In fact, the State of Nebraska was given specific written notice in February, 1990, by US Ecology at the direction of Thorson, that the Butte site was the final one. This notice was provided to every member of the legislature and the governor of the State of Nebraska by means of a formal "**Notice of Final Selection**" furnished to the clerk of the Nebraska legislature, specifically stating that the "selection of the Butte site is the final site selected for license application" and the Butte site "is the only site for which a license document will be prepared." (Ex. 10.) In

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Citizens of Nebraska, Judge Beam recognized that "the Compact Commission designated Nebraska as the host state for the disposal facility and *selected Boyd County as the facility's site. . . . The Boyd County facility cannot begin operating until it receives a license from the NDEC.*" 970 F.2d at 423 (emphasis added). Thus, there is no question that the selection of the Butte site was a final decision within the meaning of Article IV, Section (1), because there was nothing left for the Commission to do except wait for a license from Nebraska. In fact, Plaintiff argues in its brief that "since the issuance of a license is imminent the threat of harm in construction of the facility without meeting all conditions is also immediate." (Pl.'s Br. at 8.)

my judgment, this notice, provided in February, 1990, caused the sixty-day limitation period to begin to run as it constituted a final decision by the Commission.

While the question of what constitutes a "final decision" can be vexing, **see, e.g.,** 4 Kenneth Culp Davis, **Administrative Law Treatise** § 26.10 (1983), this case is not difficult. Generally speaking, a decision, such as the one at issue here, is final when any one of three factors is present: (1) the ruling is definitive, (2) the ruling has legal force or impacts the party seeking relief in a practical way, or (3) review of the ruling would serve efficiency or enforcement of the underlying law. **Fed. Trade Comm'n v. Standard Oil Co. of Cal.,** 449 U.S. 232, 243 (1980).

The ruling in this case is definitive. There is no longer any discretion left for the Commission to exercise. Upon issuance of the license by the State of Nebraska, the facility becomes the approved regional facility.

The ruling has legal force because at the very least the decision authorizes the developer to pursue a license. Moreover, the ruling has a practical and a legal impact upon the State of Nebraska because the State of Nebraska, the party seeking review, is required by the Compact to timely consider the license application authorized by the Commission. Art. V § (e)(2).

Still further, a timely review of the site selection decision would have been an efficient procedure that would have furthered the interests of all members of the Compact. Had the State of Nebraska timely asserted its objection to the site selection decision, such a review could have been conducted *before* the Commission spent over 33 million dollars pursuing a license.

But the State of Nebraska contends that it is unable to locate any evidence that the Compact Commission formally made a decision that "community consent" had been achieved. Thus, the State argues that it had no notice that a decision had been made regarding community consent because there is no evidence that the Commission formally considered the issue of "community consent." This argument misses the mark for two reasons.

Initially, there is no legal basis under the Compact or otherwise[6] for concluding that the Compact Commission was required to separately and independently decide that community consent had been achieved. **See** Art. V. Once the Compact Commission and US Ecology had made their "final site selection," this obviously involved making all the decisions necessary to reach such a conclusion. Without a legal requirement that the Compact Commission specifically determine the existence of "community consent," there is no basis for challenging the lack of a specific finding.

Moreover, once Governor Kay Orr, the originator of the concept of "community consent," specifically found that community consent existed, there was nothing for the Commission to decide. (Ex. 3 ¶¶ 16, 18.) There simply was no reason for the Commission to think that it was required to make elaborate findings on "community consent" when the person who demanded utilization of the concept in the first place was satisfied that the condition had been met.

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[6] There was nothing in the resolution adopted by the Commission that required it to make special findings. (Ex. 2 & attach. B.)

Finally, I conclude that assertion of this relatively short period of limitations against the State of Nebraska is not unfair. If Governor Nelson had any question about what position the Compact and US Ecology were taking on the issue of "community consent," such doubt would clearly have been resolved when the governor was served with an extensive legal memorandum explicitly and bluntly setting forth the Commission's position. Governor Nelson does not dispute that he was served with an extensive legal memorandum, sixteen pages in length, together with attachments totaling hundreds of pages.

That specific legal document stated that the "Compact Commission has concluded and firmly believes that all legal requirements relative to community consent have been met or exceeded." (Ex. 15, at 1.) Therefore, it is not unfair to assert the statute of limitations against Nebraska inasmuch as Governor Nelson was given specific notice in his capacity as governor-elect that the Commission and the developer believed community consent had been established, and the Commission and the developer were proceeding on that assumption. Notwithstanding this explicit and blunt notice, Governor Nelson did not cause this suit to be commenced until January, 1993, more than two years after he was specifically notified of the position of the Compact Commission and the developer.

In summary, I conclude that when the formal "Notice of Final Selection" was delivered to the clerk of the Nebraska legislature in February, 1990, the sixty-day statute of limitations began to run against the State of Nebraska. I further conclude that it is not unfair to assert this relatively short statute of limitations against the State of Nebraska under the present circumstances because the

governor of the state received specific notice of the position of the Compact Commission and the developer and yet waited more than two years thereafter before instituting suit. Accordingly, the motion for summary judgment will be granted, with the court finding and concluding that this action is time barred by the sixty-day limitation period set forth in the Compact.

2.

The Commission and US Ecology further argue that Plaintiff is not entitled to the equitable relief it seeks because such relief is barred by the doctrines of estoppel and laches. I agree.

Three things are particularly pertinent. Governor Orr, who originated the concept of "community consent," has frequently and consistently stated that "community consent," has frequently and consistently stated that "community consent" has been satisfied. (Ex. 3 ¶¶ 16, 18 & attach. A.) Governor Nelson, by virtue of his receipt of exhibit 15, was specifically notified that the Compact Commission and US Ecology believed that "community consent" had been achieved and there was no further legal requirement to be satisfied with regard to community consent. Lastly, after the notice of final site selection was delivered to the Nebraska legislature, the Compact Commission spent 33 million dollars, including 8 million dollars paid to the State of Nebraska, in order to pursue licensing of its final site selection in Boyd County, Nebraska. Under the circumstances, it would be grossly inequitable to permit the State of Nebraska to challenge

the actions of the Compact Commission and the developer at this late date.

Two related legal theories apply in this case. Those are the doctrines of equitable estoppel and laches. **See, e.g., Bostwick Irrigation Dist. v. United States,** 900 F.2d 1285, 1291-92 (8th Cir. 1990).

The doctrine of equitable estoppel " 'requires proof of words or deeds (or sometimes omissions to speak or act) that create a misleading impression upon which a reasonable person would rely.' " **Lincoln Gen. Hosp. v. Blue Cross/Blue Shield,** 963 F.2d 1136, 1141 (8th Cir. 1992) (quoting **Dyna-Tel, Inc. v. Lakewood Eng'g & Mfg. Co.,** 946 F.2d 539, 543 (7th Cir. 1991) (Posner, J.)). Generally speaking, there are three elements to equitable estoppel: (1) a party must make a misrepresentation or take an action with reason to believe the other party will rely upon it; (2) the second party must not have access to the truth; and (3) the second party must rely upon the first party's action to its detriment. **Bostwick Irrigation Dist.,** 900 F.2d at 1291. I believe all three elements exist here.

First, the Office of the Governor of the State of Nebraska (regardless of who occupied that office) made specific and repeated public statements that "community consent" had been achieved. In fact, the person making those statements (Governor Orr) originated the "community-consent" concept.

For example, during the fall of 1990, Boyd County resident Lowell Fisher went on a hunger strike in protest against the Butte site. Governor Orr's office received many letters urging her to order a vote of Boyd County

residents to determine whether or not community consent for the proposed facility existed. Governor Orr declined to do so, and the governor's office generated a form letter which was sent out in response to the many letters received. The October, 1990, form letter, mailed to approximately seventy-five people, stated in pertinent part:

> Unfortunately, what Lowell was requesting from me is not in my power to deliver. A governor has absolutely no constitutional or statutory authority to call an election of any sort. When announcing the condition of community consent it was specifically stated that a local referendum was not anticipated. Rather, community consent would be manifest through the actions of locally elected officials. The closest consolidated community to the site is Butte. The Butte Town Board has had in place, and continues to have, a resolution which supports and invites the facility.

(Ex. 3 Orr Aff. ¶ 16.)

Second, it is clear that Defendants did "not have access to the truth." **Bostwick Irrigation Dist.,** 900 F.2d at 1291. In this case, Plaintiff asserts the "truth" is that the residents of Boyd County, Nebraska, would not vote to have the storage facility located in their county. As proof of this assertion, Plaintiff alleges that a "poll" of Boyd County residents was conducted. (Filing 3 Am. Compl. ¶¶ 22, 23.) However, it is an undisputed fact that there is no provision under Nebraska law to allow the holding of such an election or referendum. Therefore, there was no way in which Defendants could ascertain the "truth,"

assuming the "truth" were to be defined in the manner proposed by Plaintiff.

Finally, there is no question that Defendants have suffered harm by relying upon the statements and representations of the governor's office, to their detriment. Defendants have authorized the expenditure of some 33 million dollars since March, 1990, eight million dollars of which has been paid directly to the State of Nebraska. It is inconceivable that Defendants would have proceeded to spend 33 million dollars but for their justifiable reliance on the statements made publicly by the governor's office.

The State of Nebraska argues that Defendants have "no justification for relying on an assertion of any single individual. . . . " (Pl.'s Br. at 24.) The "single individual" that the State of Nebraska apparently refers to is Governor Orr. This argument, charitably, is nonsense.

Defendants did not rely on a single individual. Defendants relied upon the Governor of the State of Nebraska. Clearly she had the legal authority to speak for the State of Nebraska, just as Governor Nelson has the legal authority to bring this suit. Moreover, Defendants' reliance was particularly justified because Governor Orr originated the concept of community consent.

I therefore conclude that all the elements of equitable estoppel have been established in this case.

In this connection, I believe the words of Justice Jackson in **West Virginia ex rel. Dyer v. Sims,** 341 U.S. 35-36, are apropos. In that case, the West Virginia courts held, after West Virginia had entered into an interstate

compact, that the Constitution of the State of West Virginia barred the State from participating in the interstate compact. The United States Supreme Court unanimously reversed the holding of the West Virginia court. In a concurring opinion, Justice Jackson wrote the following passage which is particularly relevant here:

> West Virginia points to no provision of her Constitution which we can say was clear notice or fair warning to Congress or other states of any defect in her authority to enter into this compact. It is a power inherent in sovereignty limited only to the extent that congressional consent is required. (Citations omitted.) *Whatever she now says her Constitution means, she may not apply retroactively that interpretation to place an unforeseeable construction upon what the other states to this compact were entitled to believe was a fully authorized act.*
>
> Estoppel is not often to be invoked against a government. *But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. After Congress and sister states had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act.*

Id. at 35-36 (emphasis added).

I turn next to the related doctrine of laches. As the court said in **Bostwick Irrigation Dist.**, the "doctrine of laches is an equitable defense to be applied when one party is 'guilty of unreasonable and inexcusable delay that has resulted in prejudice' to the other party." 900 F.2d at 1291 (quoting **Goodman v. McDonnell Douglas**

Corp., 606 F.2d 800, 804 (8th Cir. 1979), **cert. denied**, 446 U.S. 913 (1980)).

For essentially the same reasons that the doctrine of equitable estoppel is properly applied in this case, the doctrine of laches applies here as well. There is no question that the State of Nebraska has been guilty of unreasonable and inexcusable delay. The State was specifically put on notice that Defendants had finally selected the Butte site in February, 1990. Moreover, Governor Nelson himself was specifically advised that "community consent" had been achieved. Notwithstanding these clear and unequivocal notices, the State of Nebraska did not bring this suit until after Defendants had authorized the expenditure of 33 million dollars and paid the state approximately 8 million dollars.

Accordingly,

IT IS ORDERED that Defendants' motions for summary judgment (Filings 29 and 30) are granted.

DATED this 8th day of October, 1993.

BY THE COURT:

/s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

AMENDED

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-3724

No. 93-3724NEL

State of Nebraska, et [sic] rel. E. Benjamin Nelson, Governor,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
Appellant,	*	
v.	*	
Central Interstate Low-Level Radioactive Waste Commission, et al.,	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Richard S. Arnold took no part in the consideration or decision of the suggestion for rehearing en banc.

August 1, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-3724NEL

State of Nebraska, ex. rel. E. Benjamin Nelson, Governor, Appellant, v. Central Interstate Low-Level Radioactive Waste Commission, et al., Appellees.	* * * * * * * * *	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 25, 1994

Order entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals Eighth Circuit

(BB) CENTRAL INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMPACT

A BILL

FOR AN ACT to ratify and approve the Central-Interstate Low-Level Radioactive Waste Compact; to assign duties; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. The State of Nebraska ratifies and approves the following compact:

CENTRAL INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMPACT

ARTICLE I. POLICY AND PURPOSE

The party states recognize that each state is responsible for the management of its nonfederal low-level radioactive wastes. They also recognize that the Congress, by enacting the Low-Level Radioactive Waste Policy Act, P.L. 96-573, has authorized and encouraged states to enter into compacts for the efficient management of wastes. It is the policy of the party states to cooperate in the protection of the health, safety, and welfare of their citizens and the environment, and to provide for and encourage the economical management of low-level radioactive wastes. It is the purpose of this compact to provide the framework for such a cooperative effort; to promote the health, safety, and welfare of the citizens and the environment of the region; to limit the number of facilities needed to effectively and efficiently manage low-level radioactive wastes and to encourage the reduction of the generation thereof; and to distribute the costs, benefits, and obligations among the party states.

SPECIAL ACTS AND RESOLUTIONS

ARTICLE II. DEFINITIONS

As used in this compact, unless the context clearly requires a different construction:

(a) Commission means the Central Interstate Low-level Radioactive Waste Commission;

(b) Disposal means the isolation and final disposition of waste;

(c) Extended care means the care of a regional facility including necessary corrective measures subsequent to its active use for waste management until such time as the regional facility no longer poses a threat to the environment or public health;

(d) Facility means any site, location, structure, or property used or to be used for the management of waste;

(e) Generator means any person who, in the course of or as an incident to manufacturing, power generation, processing, medical diagnosis and treatment, biomedical research, other industrial or commercial activity, other research, or mining in a party state, produces or processes waste. Generator does not include any person who receives waste generated outside the region for subsequent shipment to a regional facility;

(f) Host state means any party state in which a regional facility is situated or is being developed;

(g) Low-level radioactive waste or waste means, as defined in the Low-Level Radioactive Waste Policy Act, P.L. 96-573, radioactive waste not classified as: high-level

radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11 e.(2) of the Atomic Energy Act of 1954, as amended through 1978;

(h) Management of waste means the storage, treatment, or disposal of waste;

(i) Notification of each party state means transmittal of written notice to the Governor, presiding officer of each legislative body, and any other persons designated by the party state's commission member to receive such notice;

(j) Party state means any state which is a signatory party to this compact;

(k) Person means any individual, corporation, business enterprise, or other legal entity, either public or private;

(l) Region means the area of the party states;

(m) Regional facility means a facility which is located within the region and which has been approved by the commission for the benefit of the party states;

(n) Site means any property which is owned or leased by a generator and is contiguous to or divided only by a public or private way from the source of generation;

(o) State means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, or any other territorial possession of the United States;

(p) Storage means the holding of waste for treatment or disposal; and

(q) Treatment means any method, technique, or process, including storage for radioactive decay, designed to change the physical, chemical, or biological characteristics or composition of any waste in order to render such waste safer for transport or management, amenable for recovery, convertible to another usable material, or reduced in volume.

ARTICLE III. RIGHTS AND OBLIGATIONS

(a) There shall be provided within the region one or more regional facilities which together provide sufficient capacity to manage all wastes generated within the region. It shall be the duty of regional facilities to accept compatible wastes generated in and from party states, and meeting the requirements of this act, and each party state shall have the right to have the wastes generated within its borders managed at such facility.

(b) To the extent authorized by federal law and host state law, a host state shall regulate and license any regional facility within its borders and ensure the extended care of such facility.

(c) Rates shall be charged to any user of the regional facility, set by the operator of a regional facility, and shall be fair and reasonable and be subject to the approval of the host state. Such approval shall be based upon criteria established by the commission.

(d) A host state may establish fees which shall be charged to any user of a regional facility, and which shall

be in addition to the rates approved pursuant to section (c) of this Article, for any regional facility within its borders. Such fees shall be reasonable and shall provide the host state with sufficient revenue to cover any costs associated with such facilities. If such fees have been reviewed and approved by the commission, and to the extent that such revenue is insufficient, all party states shall share the costs in a manner to be determined by the commission.

(e) To the extent authorized by federal law, each party state is responsible for enforcing any applicable federal and state laws and regulations pertaining to the packaging and transportation of waste generated within or passing through its borders, and shall adopt practices that will ensure

that waste shipments originating within its borders and destined for a regional facility will conform to applicable packaging and transportation laws and regulations.

(f) Each party state has the right to rely on the good faith performance of each other party state.

(g) Unless authorized by the commission, it shall be unlawful after January 1, 1986, for any person:

(1) To deposit at a regional facility, waste not generated within the region;

(2) To accept, at a regional facility, waste not generated within the region;

(3) To export from the region, waste which is generated within the region; and

(4) To transport waste from the site at which it is generated, except to a regional facility.

ARTICLE IV. THE COMMISSION

(a) There is hereby established the Central Interstate Low-Level Radioactive Waste Commission. The commission shall consist of one voting member from each party state to be appointed according to the laws of each state. The appointing authority of each party state shall notify the commission in writing of the identity of its member and any alternates. An alternate may act on behalf of the member only in the absence of such member. Each state is responsible for the expenses of its member of the commission.

(b) Each commission member shall be entitled to one vote. Unless otherwise provided herein, no action of the commission shall be binding unless a majority of the total membership casts its vote in the affirmative.

(c) The commission shall elect from among its membership a chairperson. The commission shall adopt and pubic, in convenient form, bylaws and policies which are not inconsistent with this compact.

(d) The commission shall meet at least once a year, and shall also meet upon the call of the chairperson, by petition of a majority of the membership, or upon the call of a host state member.

(e) The commission may initiate any proceedings or appear as an intervenor or party in interest before any

court of law, or any federal, state, or local agency, board, or commission that has jurisdiction over any matter arising under or relating to the terms and provisions of this compact. The commission shall determine in which proceedings it shall intervene or otherwise appear, and may arrange for such expert testimony, reports, evidence, or other participation in such proceedings as may be necessary to represent its views.

SPECIAL ACTS AND RESOLUTIONS

(f) The commission may establish such committees as it deems necessary for the purpose of advising the commission on any and all matters pertaining to the management of waste.

(g) The commission may employ and compensate a staff limited only to those persons necessary to carry out its duties and functions. The commission may also contract with and designate any person to perform necessary functions to assist the commission. Unless otherwise required by acceptance of a federal grant, the staff shall serve at the commission's pleasure irrespective of the civil service, personnel, or other merit laws of any of the party states or the federal government and shall be compensated from funds of the commission.

(h) Funding for the commission shall be as follows:

(1) The commission shall set and approve its first annual budget as soon as practicable after its initial meeting. Party states shall equally contribute to the commission budget on an annual basis, an amount not to exceed

twenty-five thousand dollars until surcharges are available for that purpose. Host states shall begin imposition of the surcharges provided for in this section as soon as practicable and shall remit to the commission funds resulting from collection of such surcharges within sixty days of their receipt; and

(2) Each state hosting a regional facility shall annually levy surcharges on all users of such facilities, based on the volume and characteristics of wastes received at such facilities, the total of which:

(a) Shall be sufficient to cover the annual budget of the commission; and

(b) Shall be paid to the commission, provided, however, that each host state collecting such surcharges may retain a portion of the collection sufficient to cover the administrative costs of collection, and that the remainder be sufficient only to cover the approved annual budget of the commission.

(i) The commission shall keep accurate accounts of all receipts and disbursements. An independent certified public accountant shall annually audit all receipts and disbursements of commission funds and submit an audit report to the commission. Such audit report shall be made a part of the annual report of the commission required by this Article.

(j) The commission may accept for any of its purposes and functions any and all donations, grants of money, equipment, supplies, materials and services, conditional or otherwise from any person, and may receive, utilize and dispose of same. The nature, amount, and

conditions, if any, attendant upon any donation or grant accepted pursuant to this section, together with the identity of the donor, grantor, or lender, shall be detailed in the annual report of the commission.

(k)(1) Except as otherwise provided herein, nothing in this compact shall be construed to alter the incidence of liability of any kind for any act, omission, course of conduct, or on account of any casual or other relationships. Generators, transporters of waste, and owners and operators of facilities shall be liable for their acts, omissions, conduct, or relationships in accordance with all laws relating thereto.

(2) The commission herein established is a legal entity separate and distinct from the party states and shall be so liable for its actions. Liabilities of the commission shall not be deemed liabilities of the party states. Members of the commission shall not be personally liable for actions taken by them in their official capacity.

(l) Any person or party state aggrieved by a final decision of the commission may obtain judicial review of such decisions in the United States District Court in the district wherein the commission maintains its headquarters by filing in such court a petition for review within sixty days after the commission's final decision. Proceedings thereafter shall be in accordance with the rules of procedure applicable in such court.

(m) The commission shall:

(1) Receive and approve the application of a non-party state to become a party state in accordance with Article VII;

(2) Submit an annual report to, and otherwise communicate with, the Governors and the presiding officers of the legislative bodies of the party states regarding the activities of the commission;

(3) Hear and negotiate disputes which may arise between the party states regarding this compact;

(4) Require of and obtain from the party states, and nonparty states seeking to become party states, data and information necessary to the implementation of commission and party states' reponsibilities [sic];

(5) Approve the development and operation of regional facilities in accordance with Article V;

(6) Notwithstanding any other provision of this compact, have the authority to enter into agreements with any person for the importation of waste into the region and for the right of access to facilities outside the region for waste generated within the region. Such authorization to import or export waste requires the approval of the commission, including the affirmative vote of any host state which may be affected;

(7) Revoke the membership of a party state in accordance with Articles V and VII;

(8) Require all party states and other persons to perform their duties and obligations arising under this compact by an appropriate action in any forum designated in section (e) of Article IV; and

(9) Take such action as may be necessary to perform its duties and functions as provided in this compact.

ARTICLE V. DEVELOPMENT AND OPERATION OF REGIONAL FACILITIES

(a) Following the collection of sufficient data and information from the states, the commission shall allow each party state the opportunity to volunteer as a host for a regional facility.

(b) If no state volunteers or if no proposal identified by a volunteer state is deemed acceptable by the commission, based on the criteria in section (c) of this Article, then the commission shall publicly seek applicants for the development and operation of regional facilities.

(c) The commission shall review and consider each applicant's proposal based upon the following criteria;

(1) The capability of the applicant to obtain a license from the applicable authority;

(2) The economic efficiency of each proposed regional facility, including the total estimated disposal and treatment costs per cubic foot of waste;

(3) Financial assurances;

(4) Accessibility to all party states; and

(5) Such other criteria as shall be determined by the commission to be necessary for the selection of the best proposal, based on the health, safety, and welfare of the citizens in the region and the party states.

(d) The commission shall make a preliminary selection of the proposal or proposals considered most likely to meet the criteria enumerated in section (c) and the needs of the region.

(e) Following notification of each party state of the results of the preliminary selection process, the commission shall:

(1) Authorize any person whose proposal has been selected to pursue licensure of the regional facility or facilities in accordance with the proposal originally submitted to the commission or as modified with the approval of the commission; and

(2) Require the appropriate state or states or the U.S. Nuclear Regulatory Commission to process all applications for permits and licenses required for the development and operation of any regional facility or facilities within a reasonable period from the time that a completed application is submitted.

(f) The preliminary selection or selections made by the commission pursuant to this Article shall become final and receive the commission's approval as a regional facility upon the issuance of a license by the licensing authority. If a proposed regional facility fails to become licensed, the commission shall make another selection pursuant to the procedures identified in this Article.

(g) The commission may by a two-thirds affirmative vote of its membership, revoke the membership of any party state which, after notice and hearing, shall be found to have arbitrarily or capriciously denied or delayed the issuance of license or permit to any person authorized by the commission to apply for such license or permit. Revocation shall be in the same manner as provided for in section (e) of Article VII.

ARTICLE VI. OTHER LAWS AND REGULATIONS

(a) Nothing in this compact shall be construed to:

(1) Abrogate or limit the applicability of any act of Congress, or diminish or otherwise impair the jurisdiction of any federal agency expressly conferred thereon by the Congress;

(2) Prevent the application of any law which is not otherwise inconsistent with this compact;

(3) Prohibit or otherwise restrict the management of waste on the site where it is generated if such is otherwise lawful;

(4) Affect any judicial or administrative proceeding pending on the effective date of this compact;

(5) Alter the relations between, and the respective internal responsibilities of, the government of a party state and its subdivisions; and

(6) After the generation or management of waste generated by the federal government or federal research and development activities.

(b) No party state shall pass or enforce any law or regulation which is inconsistent with this compact.

(c) All laws and regulations or parts thereof of any party state which are inconsistent with his compact are hereby declared null and void for purposes of this compact. Any legal right, obligation, violation, or penalty arising under such laws or regulations prior to enactment of this compact shall not be affected.

(d) No law or regulation of a party state or of any subdivision or instrumentality thereof may be applied so as to restrict or make more costly or inconvenient access to any regional facility by the generators of another party state than for the generators of the state where the facility is situated.

ARTICLE VII. ELIGIBLE PARTIES, WITHDRAWAL, REVOCATION, ENTRY INTO FORCE, TERMINATION

(a) This compact shall have as initially eligible parties the states of Arkansas, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, and South Dakota. Such initial eligibility shall terminate on January 1, 1984.

(b) Any state may petition the commission for eligibility. A petitioning state shall become eligible for membership in the compact upon the unanimous approval of the commission.

(c) An eligible state shall become a member of the compact and shall be bound by it after such state has enacted the compact into law. In no event shall the compact take effect in any state until it has been entered into force as provided for in section (f) of this Article.

(d) Any party state may withdraw from this compact by enacting a statute repealing the same. Unless permitted earlier by unanimous approval of the commission, such withdrawal shall take effect five years after the Governor of the withdrawing state has given notice in writing of such withdrawal to each Governor of the party states. No withdrawal shall affect any liability already

incurred by or chargeable to a party state prior to the time of such withdrawal.

(e) Any party state which fails to comply with the terms of this compact or fulfill its obligations hereunder may, after notice and hearing, have its privileges suspended or its membership in the compact revoked by the commission. Revocation shall take effect one year from the date such party state receives written notice from the commission of its action. The commission may require such party state to pay to the commission, for a period not to exceed five years from the date of notice of revocation, an amount determined by the commission based on the anticipated fees which the generators of such party state would have paid to each regional facility, and an amount equal to that which such party state would have contributed in accordance with section (d) of Article III in the event of insufficient revenues. The Commission shall use such funds to ensure the continued availability of safe and economical waste management facilities for all remaining party states. Such state shall also pay an amount equal to that which such party state would have contributed to the annual budget of the commission if such party state would have remained a member of the compact. All legal rights established under this compact of any party state which has its membership revoked shall cease upon the effective date of revocation; however, any legal obligations of such party state arising prior to the effective date of revocation shall not cease until they have been fulfilled. Written notice of revocation of any state's membership in the compact shall be transmitted immediately following the vote of the commission, by the chairperson, to the Governor of the

affected party state, all other Governors of the party states, and the Congress of the United States.

(f) This compact shall become effective after enactment by at least three eligible states and after consent has been given to it by the Congress. The Congress shall have the opportunity to withdraw such consent every five years. Failure of the Congress to withdraw its consent affirmatively shall have the effect of renewing consent for an additional five-year period. The consent given to this compact by the Congress shall extend to any future admittance of new party states under sections (b) and (c) of this Article and to the power to ban the exportation of waste pursuant to Article III.

(g) The withdrawal of a party state from this compact under section (d) of this Article or the revocation of a state's membership in this compact under section (e) of this Article shall not affect the applicability of this compact to the remaining party states.

(h) This compact shall be terminated when all party states have withdrawn pursuant to section (d) of this Article.

ARTICLE VIII. PENALTIES

(a) Each party state, consistent with its own law, shall prescribe and enforce penalties against any person for violation of any provision of this compact.

(b) Each party state acknowledges that the receipt by a regional facility of waste packaged or transported in violation of applicable laws and regulations can result in

sanctions which may include suspension or revocation of the violator's right of access to the regional facility.

ARTICLE IX. SEVERABILITY AND CONSTRUCTION

The provisions of this compact shall be severable and if any phrase, clause, sentence, or provision of this compact is declared by a court of competent jurisdiction to be contrary to the Constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If any provision of this compact shall be held contrary to the Constitution of any state participating therein, the compact shall remain in full force and effect as to the state affected as to all severable matters. The provisions of this compact shall be liberally construed to give effect to the purpose thereof.

Source: Laws 1983, LB 200, § 1.

Sec. 2. Repealed, Laws 1989, LB 761, § 19.

Sec. 3. For purposes of section (c) of Article III of the compact, the Environmental Control Council is hereby designated as the rate-review agency for this state.

Source: Laws 1983, LB 200, § 3.
Effective date May 18, 1983.

(2)

Court
FILED
OCT 11 1994
OFFICE OF THE CLERK

No. 94-444

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA, ex rel.
E. BENJAMIN NELSON, Governor,

Petitioner,

v.

CENTRAL INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMMISSION; and US ECOLOGY, INC., a California Corporation,

Respondents.

On Petition For A Writ Of Certiorari From The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. 94-444

In The

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On Petition For A Writ Of Certiorari From The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Central Interstate Low-Level Radioactive Waste Commission and US Ecology, Inc.,[1] respectfully request that the Court deny the petition for a writ of certiorari, seeking review of the Eighth Circuit's opinion in this case.

[1] The parent corporation of US Ecology, Inc. is American Ecology, Inc. See, Supreme Court Rule 29.1.

STATEMENT OF THE CASE

Petitioner's statement of the case fails to set out the facts underlying this action. As the district court's opinion discloses, there are no material facts in dispute in this case. The following facts were determined by the district court to be uncontroverted; indeed, the petitioner conceded virtually all of them to be true. *See* Pet. App. at 18-19.

In late 1987, Nebraska's then-Governor, Kay A. Orr, proposed conditions relating to the siting and construction of a proposed low-level radioactive waste disposal facility for adoption by the Central Interstate Low-Level Radioactive Waste Commission (hereinafter "Commission"). Such conditions, including one relating to "community consent," were adopted by the Commission, subject to certain qualifications. Pet. App. at 15. At the time she proposed the "community consent" concept, and thereafter, Governor Orr explicitly rejected the idea that "community consent" should be determined by some form of local vote. Pet. App. at 16.

In 1988, shortly after the Commission's adoption of Governor Orr's "community consent condition," the Nebraska Legislature enacted a statute which explained or defined the "community consent" concept. That statute did not attempt to impose any specific method for determining the existence of "community consent" on either the Commission, or the project developer, US Ecology, Inc. Pet. App. at 15-16. Thereafter, the Nebraska Legislature has repeatedly and consistently refused to enact any law requiring or authorizing a vote of any kind as a

measure of the "community consent" concept. Pet. App. at 16.

As the district court expressly found, "throughout 1988 and 1989, US Ecology made extensive efforts to solicit community support for the proposed facility in a variety of communities in Nebraska." Pet. App. at 16. In response to US Ecology's efforts, the community of Butte, located in Boyd County, Nebraska, invited US Ecology to investigate the geology in the surrounding area to determine if the disposal facility could be located there. The Village Board of Butte, Nebraska, has consistently expressed support for the proposed facility, with the most recent official expression of support by the community of Butte, Nebraska, occurring at about the time this lawsuit was filed. Pet. App. at 16.

The site near Butte, Nebraska, was selected as the final site for construction of the proposed regional disposal facility in late 1989, and Nebraska was officially notified of that site selection by both the Commission and US Ecology in February, 1990. Pet. App. at 17. The formal notification by the Commission was authored by Norman W. Thorson, who at the time was Nebraska's representative on the Commission and was serving as the Commission's chairman. Pet. App. at 25-26. Thorson's letter notifying Nebraska that the selection of the Butte site was final was sent to Nebraska's Governor, each member of Nebraska's Legislature, each member of the Commission, and the Commission's Executive Director. Pet App. at 23-24. Shortly after the notification letter from Thorson, US Ecology filed a written notice with the Clerk of the Nebraska Legislature indicating that its selection of the Butte site was final. Pet. App. at 24. On July 27, 1990, US

Ecology filed a license application with the Nebraska Department of Environmental Quality seeking a license to operate a regional disposal facility at the Butte, Nebraska, site. Pet. App. at 17.

Both before and after submission of the license application by US Ecology, Nebraska's Governor Orr made and authorized various public statements indicating that the community consent factor had been specifically met as to the Butte, Nebraska, site. Pet. App. at 17.

Nebraska's current Governor, E. Benjamin Nelson, was elected to office in November, 1990; he was sworn into office in early January, 1991. On about December 7, 1990, then-Governor-elect Nelson was notified, in an extensive legal memorandum signed by the Executive Director and General Counsel of the Commission and by the Commission's outside legal counsel, that "The Compact Commission has concluded and firmly believes that all legal requirements relative to community consent have been met or exceeded. The form of consent made relevant to the site selection process is one fixed at a point in time which has now passed." Pet. App. at 17-18.

Notwithstanding Governor Orr's rejection of the idea that community consent should be determined by some form of local vote, the complaint filed by the petitioner in this case alleged that community consent is lacking because a poll conducted by the Boyd County Local Monitoring Committee, in December, 1992, found among the populace of Boyd County general disagreement with the location of the site. The evidence before the district court indicated that the Monitoring Committee's "straw poll" was authorized, or at least encouraged, by Governor

Nelson. However, as the district court expressly found, "There is no legal authority under Nebraska law for a Governor to order, implement, or agree to any form of legally binding vote of the kind allegedly conducted by the Boyd County Local Monitoring Committee alleged in paragraphs 22 and 23 of the amended complaint." Pet. App. at 16.

Between March, 1990, and the date of the district court's summary judgment decision, the Commission spent or authorized the expenditure of more than $33,000,000 in furtherance of the facility proposed for the Butte, Nebraska, site; of that amount, more than $8,000,000 was paid to the State of Nebraska, mostly for license application review purposes. Pet. App. at 17.

This lawsuit was filed on January 13, 1993. That date was nearly three years after Nebraska's Governor and Legislature were specifically notified that the selection of the Butte site was final; approximately two and a half years after US Ecology submitted a license application for the Butte site; and more than two years after Governor Nelson was expressly notified by the Commission that the Commission had concluded that all legal requirements relative to community consent had been met or exceeded. Pet. App. at 14-17.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The record and decisions of the courts below do not fairly raise the questions presented in the petition.

Petitioner presents two questions. The first asks whether the Commission can make a decision which commences the running of a statute of limitation without taking a vote; the second asks whether federal courts can "apply" case law arising under the federal Administrative Procedure Act in deciding this case when that statute is claimed to be "inconsistent" with the language of the Compact. Neither question is fairly raised by the opinions of the courts below, and neither flows from the record. The Court should therefore deny the petition.

As the district court recognized, neither the Compact itself nor the resolution relating to "community consent" adopted by the Commission required the Commission or US Ecology to make any particular findings related to "community consent" or to take any kind of formal vote. Pet. App. at 28.

> Once the Compact Commission and US Ecology had made their "final site selection," this obviously involved making all the decisions necessary to reach such a conclusion. Without a legal requirement that the Compact Commission specifically determine the existence of "community consent," there is no basis for challenging the lack of a specific finding.

Id.

Further, the final site selection was not made in a vacuum; Nebraska's Governor had opined that her "community consent condition" was satisfied as to the Butte site. As the district court put it:

> Moreover, once Governor Kay Orr, the originator of the concept of "community consent," specifically found that community consent existed, there was nothing for the Commission to decide. (Ex.3 16, 18.) There simply was no reason for the Commission to think that it was required to make elaborate findings on "community consent" when the person who demanded utilization of the concept in the first place was satisfied that the condition had been met.

Pet. App. at 28. The Eighth Circuit agreed with the district court's analysis. Pet. App. at 6-8.

Petitioner implies that the Commission made some sort of "tacit, back room agreement," and further suggests that both the State of Nebraska and the public generally lacked sufficient information to protect their rights. Petition at 8. The record simply does not support these dire accusations. Dr. Thorson was Nebraska's representative on the Commission, appointed to that position by Governor Orr. The letter he sent to each member of the Nebraska Legislature and Governor Orr provided clear notice of the final selection of the Butte site. Art. II, Sec. (i) of the Compact defines "notification" as "transmittal of written notice to the Governor, presiding officer of each legislative body, and any other persons designated by the party state's commission member to receive such notice." Pet. App. at 40. Even after the change in administrations, Governor Nelson was specifically reminded that

the Commission believed that the "community consent condition" created by his predecessor had been met; that "extremely detailed, specific and blunt" communication occurred more than two years before this litigation was initiated by Governor Nelson. Pet. App. at 24.

The question petitioner presents regarding the lower courts' citation of cases decided under the APA is similarly specious. Neither the district court nor the Eighth Circuit "applied" the APA to the exclusion of the Compact's language. Rather, both courts did what courts commonly do: They reviewed helpful authorities from an analogous area of the law in analyzing the claims presented to them for decision. Nothing in that approach deprived Nebraska of any legal rights; more to the point, nothing in that approach departs so far from common adjudicative methodology to warrant this Court's attention.

Petitioner asserts no split in the circuits on any question it presents because there is none. Supreme Court Rule 10.1(a). Petitioner does not claim that the Court of Appeals has decided a federal question in a way that conflicts with any applicable decision of this Court. Supreme Court Rule 10.1(c). This case presents no important question of federal law which has not been, but should be, settled by this Court. *Id.* Simply put, there are no "special and important reasons" warranting exercise of the Court's certiorari jurisdiction. The petition should be denied.

2. The Court should deny the petition because resolution of the questions presented therein in favor of the petitioner would only result in a finding that the case is not ripe for adjudication.

The thrust of petitioner's contentions is that absent an affirmative vote of the Commission that the "community consent condition" has been met as to the Butte site, there has been no final decision of the Commission, and the 60-day statute of limitations set out in the Compact has not begun to run. However, as the Eighth Circuit observed, "The State conceded during oral argument that if we were to agree that the Commission has not made a final decision, the case would not be ripe for decision." Pet. App. at 6, n. 5. It thus appears that a decision wholly favorable to petitioner would result only in the absence of a justiciable case or controversy.

This Court does not exercise its certiorari jurisdiction to render advisory opinions or to adjudicate hypothetical disputes which may or may not arise in the future. Yet, complete adoption of petitioner's position would have precisely those results. The petition should therefore be denied.

3. The equitable relief sought by petitioner below is barred by the defenses of estoppel and laches.

Although the Court of Appeals found it unnecessary to reach the issue, Pet. App. at 9, the district court held, alternatively, that petitioner is not entitled to the equitable relief it sought (a permanent injunction barring construction of the disposal facility) because such relief is barred by the doctrines of estoppel and laches. Pet. App.

at 30-35. If the Court were to grant certiorari in this case, it would need to resolve these issues as well.

Petitioner's only mention of these alternative holdings is as follows:

> Finally, although the Eighth Circuit did not address the issue, petitioner contends that the doctrines of laches and equitable estoppel do not apply against the State of Nebraska in the type of action brought in this case. There has been no detrimental reliance by the other party states which would warrant the use of these defenses against the State.

Petition at 15.

Petitioner's assertion of "no detrimental reliance" is flatly contradicted by the undisputed facts found by the district court. As the court explained:

> Three things are particularly pertinent. Governor Orr, who originated the concept of "community consent," has frequently and consistently stated that "community consent" has been satisfied. (Ex. 3 ¶¶ 16, 18 & attach. A.) Governor Nelson, by virtue of his receipt of exhibit 15, was specifically notified that the Compact Commission and US Ecology believed that "community consent" had been achieved and there was no further legal requirement to be satisfied with regard to community consent. Lastly, after the notice of final site selection was delivered to the Nebraska legislature, the Compact Commission spent 33 million dollars, including 8 million dollars paid to the State of Nebraska, in order to pursue licensing of its final site selection in

> Boyd County, Nebraska. Under the circumstances, it would be grossly inequitable to permit the State of Nebraska to challenge the actions of the Compact Commission and the developer at this late date.

Pet. App. at 30-31.

The record in this case conclusively demonstrates that Nebraska's change in position on the subject of "community consent" is an attempt to renege on obligations for political purposes. The record shows that Governor Nelson campaigned on a platform which included a virtual promise to keep a low-level radioactive waste disposal facility from being built in Nebraska, the State's obligations under the Compact notwithstanding. Given the expenditure of more than $33,000,000 by the Commission prior to this change in positions, including over $8,000,000 paid directly to Nebraska for expenses involved in the license review process, this case presents a classic factual basis for application of the equitable doctrines of estoppel and laches. The alternative holding of the district court presents yet one more reason for denial of the petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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